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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1970

No. 798

UNITED STATES OF AMERICA AND
COMMISSIONER OF INTERNAL REVENUE,
Petitioners,

versus

ANNE GOYNE MITCHELL,
FRANCES ANGELLO, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR THE RESPONDENT FRANCES ANGELLO

ARGUMENT

I. Introduction

The Government's argument is correct in its beginning but becomes erroneous in that the law of Louisiana regarding community property is only partially stated and examined.

To be sure, ownership of property for purposes of the imposition of income tax is determined by reference to State law, *Poe v. Seaborn*, 282 US 101; *Bender v. Pfaff*, 282 US 127, and, therefore, the law of Louisiana must be *thoroughly* analyzed as to the wife's ownership of or interest in community property in order to determine the individual liability of Mrs. Frances Angello for income taxes in this case and the corresponding vulnerability vel non of her separate property to seizure by the Government for collection of that tax.

We recognize the law in Louisiana to be that the wife's half interest in the community property is not a mere expectancy during the marriage but that her title for half of that property is vested in the wife the moment it is acquired by the community. *Phillips v. Phillips*, 160 La. 813, 107 So. 584. But we contend that this is just one facet of Louisiana community property law and for a full understanding of the system in relation to the instant case two other features of the law must be considered.

The first feature which the Government ignores is the substantive legal effect flowing from the wife's renunciation of the community. The second is the substantive insulation of the wife's separate property from vulnerability to seizure by the community's creditors which the Government seems to categorize as a kind of state exemption statute pre-empted by Section 6334 of the Internal Revenue Code.

II. The Government Has Erred In Failing To Recognize The Substantive Legal Effects which Flow From The Wife's Renunciation Of The Community

In *Phillips v. Phillips,* Supra, where the wife had brought an action to partition community property and was resisted by the husband on the grounds that she had not accepted the community, the Supreme Court held as follows:

> "For the wife to accept the marital community with benefit of inventory is nothing more than an expression of her consent to receive the residue of the community estate, if there be any, after the debts of the community are paid. The wife thereby incurs no obligation or responsibility whatsoever."

From that language we have an insight into the nature of the wife's interest in community property within the context of her renunciation of the community. In several early cases the Supreme Court had occasion to be more specific as to the nature of the wife's interest in the community in those cases where she has renounced the community.

For instance, in *McDonough v. Tregre,* 7 Mart. (N.S.) 68, where the wife was claiming a superior mortgage under the Civil Code which secures her claim for a restitution of her dotal effects as opposed to a seizing creditor of the community, the Court held:

> "... the property acquired during marriage belongs not to him but to the community. This argument proceeds on the idea, that during marriage the wife, by the effect of the law, is a partner in all the acquisitions made by the husband. But she is only so in our judgment when she accepts the community. From the moment she renounces, as she did in this case, everything done during coverture, in regard to the purchase or alienation of property, concerns the husband alone ..."

In *Johnson v. Pilster*, 4 Rob. 71, the Court held:

> "When the wife renounces the community of gains and acquets ... all purchases of property made during the marriage remain for the account of the husband alone, so much as if he had made them before the marriage. The effect of the renunciation is to place the husband and wife in the situation they would be in, had no community ever existed between them."

In the Government's brief there is an attempt made to minimize the importance of *Brassac v. Ducros*, 4 Rob. 335. Here again we submit there is a clear lesson from the Louisiana Supreme Court as to the indispensability of a consideration of the effect of the wife's renunciation of the community in any consideration of the overall nature of her interest in the community. In that case the wife attacked a sale by the husband of community effects which had not been recorded. The Court stated unequivocally that although a part-

nership does exist in contemplation of law between the husband and wife during community, it does so only when she accepts that community and if she renounces the community it is as to her as though it never existed, and everything done during the marriage in relation to the purchase or alienation of the property must be considered as done by the husband alone.

When these cases dealing with the effect of the renunciation of the community by the wife are read in conjunction with the cases which hold that the wife's interest in the community is a vested interest and that hers is a true ownership of the property belonging to the community, the conclusion must be reached that the nature of her ownership is a potential right to claim or a right to perfect a claim to all of the property which is acquired during the marriage tempered with an equal right on her part to renounce the community upon its dissolution together with any and all obligations which might have gone along had she accepted the community. Her right to renounce the community and to place herself in the position as though the community never existed is no less substantive than her right to claim a vested interest in the community property if she accepts the community.

III The Government Has Erred In Categorizing The Insulation of The Wife's Separate Property From Seizure By Community Creditors As Merely A State Exemption Statute As Opposed To A Substantive Right Of The Wife Under Louisiana COMMUNITY PROPERTY LAW

Likewise, the wife has a substantive right under Louisiana community property law to have her separate property insulated from seizure by community creditors. Civil Code, Article 2403. *Successions of George and Frances Clark*, 27 La. Ann 269; *Fluke v. Martin*, 26 La. Ann. 279; *Brock Furniture Co. v. Carroll*, App. 1956, 86 So.2d 715, *Smith v. Viser*, App. 1960, 117 So.2d 673.

The Government would brush aside these cases with the contention that this is a form of state exemption of property from seizure which would be pre-empted by Sections 6321, 6331 and 6334 of the Internal Revenue Code but this is not a mere state exemption provision of Louisiana law but, on the contrary, is a solemn and integral part of the Louisiana community property system.

In *Smith v. Viser*, supra, it was held:

> "It is probable that there are no principles more elementary, more fundamental, more firmly imbedded in the law of Louisiana and more clearly understood, than the principles that the wife is not personally liable for a community debt; that the husband is the head and

> master of the community, and that creditors thereof must obtain satisfaction of their claims from the husband who is individually liable for community debts, or, in certain instances, by proceeding against the community property. See LSA-C.C. Article 2403."

We submit that the insulation of the wife's separate property from seizure by creditors of the community is every bit as important an aspect of Louisiana law as is the concept that the wife has a vested interest in the community in determining the question of her ownership for tax purposes. It is clearly not merely a procedural state exemption provision but, on the contrary, a substantive right bestowed on the wife by Louisiana law.

United States v. Overman, 424 F2d 1142, and *In re Ackerman*, 424 F2d 1148, do not lend support to the Government's position in this case. Those cases hold that the husband's interest in community property is vulnerable to seizure for collection of taxes incurred by him before marriage. They start with the proposition that the spouse does owe the taxes. In the instant case it can be said that Mrs. Angello never did owe the taxes because she did not accept the community upon its dissolution. It follows that her separate property cannot be seized to satisfy the tax liability incurred by the community.

IV The Government's Almost Exclusive Reliance on Poe v. Seaborn, Bender v. Pfaff, and United States v. Malcolm Is Misplaced.

A major fallacy or error indulged in by the Government in this case is the proposition that the cases of *Poe v. Seaborn* and *Bender v. Pfaff* are controlling in the instant case and that the decision in the Fifth Circuit is at odds with this Court's conclusions in *Seaborn and Pfaff.*

These cases obviously stood for the proposition that the Commissioner of Internal Revenue could not require the husband to return the entire community income, but the wife could return half of the income each in those cases where she elected to do so. These cases merely hold that the wife has a sufficient interest in the community property to return half of the community income, but they do not hold that the wife *must* do so. In fact, they are inapplicable to the situation here where the wife renounces the community and is not willing to accept the community property or the burdens which would go along with that property. Apparently recognizing that *Seaborn* and *Pfaff* are insufficient to support its argument, the Government then places reliance on *United States v. Malcolm,* 282 US 792, which answered "yes" to the following question certified to this Court by the Ninth Circuit:

> "Has the wife, under Section 161(a) of the Civil Code of California, such an interest in the community income that she *should* separately

report and pay tax on one-half of such income?" [emphasis supplied].

The Government would have us believe that the word "should" in the question is synonymous with the word "must", but we do not read *Malcolm* to mean that at all. We interpret this Court's decision in *Malcolm* to mean that the wife should separately report income so as to avoid the kind of an argument which is being made in the instant case. The simple and easy solution for everyone concerned would be for the wife to separately report and pay tax on one-half of her income, but there is absolutely nothing in *Malcolm* which can be interpreted to mean that this Court held as Government states in its brief that the wife is *required* to return one-half of the community income either in her own separate return or by filing a joint return with her husband.

Certainly there is nothing in *Malcolm* which would explain why the above cited cases on the effect of the wife's renunciation would not effectively absolve her from the obligation to pay tax where she did not in fact file any return.

We submit that the holdings of the Fifth Circuit in the instant cases are not at odds with this Court's conclusion in *Seaborn* and *Pfaff*. While it is true that the wife is the owner of her one-half share of community income the Government's position here is an over-simplification and an insupportable extension of the holdings of those cases. They recognized the right of the wife to claim the interest in the community which she

has and which is sufficient to justify her returning one-half of the income. Those cases do not hold that as a matter of law the wife who renounces the community upon its dissolution is still liable for half of the tax on the community income.

V Equitable Consideration In This Case Supports The Position of The Respondents

This argument would be incomplete without some reference to the equities involved.

Under the law of Louisiana the husband is the head and master of the community in every respect. He has the right to encumber and alienate community property without regard to the wife and the opportunity is ever present for him to deplete the assets of the community and squander its income with little chance for the wife to interfere.

Apparently the United States Congress was aware of the danger when on January 12, 1971, Public Law 91-679 84 Stat. 2063 was passed amending Sec. 6013 and 6653 of the Code. That statute provides relief to a wife from income tax liability when she signs a joint return when there are omissions from income of which she has no knowledge and where, under all the facts and circumstances, it would be inequitable to hold the spouse in question liable for the tax. Admittedly, this new law does not expressly cover a separate return situation or cases where no returns are filed so that a strict reading of this new law would make the wife

eligible for discharge from liability in situations where there would be a great inequity if she signed the return but ineligible if she did not sign a return. We submit that this Court can and should extend the same protection to the wife who did not sign a joint return as is afforded to the wife who did sign a return but was ignorant of its inaccuracy.

If this Court accepts the Government's contention and extends it to its logical conclusion, the following gross inequity could result:

Husband and wife are living in Louisiana. He goes to Las Vegas where he wins a hundred thousand dollars at the roulette table. He then sojourns in Mexico with a lady friend and returns to Louisiana and the matrimonial domicile after squandering his winnings. Being irresponsible, he never filed any income tax return and dies shortly thereafter. The widow is left penniless but later inherits from her father a small rental property which provides her with $100.00 per month rent on which she and her children are surviving. Under the Government's contention in the instant case, the widow can be assessed for one-half of the income tax on the money the husband made at the gambling table and her inherited property can be seized to satisfy this debt.

Such a result would not only be a clear cut violation of the entire concept of community property law in the State of Louisiana, but also a gross injustice by any standards. But we submit that the analogy is perfectly valid. If the Government's view is adopted for

Mrs. Angello and Mrs. Mitchell, a harsh and severe rule of law will have to be applied to the hypothetical case presented. We ask this Court not to condone such inequity but to apply Louisiana law as did the Fifth Circuit below.

Respectfully submitted,

REUTER, REUTER & SCHOTT

PATRICK M. SCHOTT

CERTIFICATE OF SERVICE

I certify that three copies of the foregoing brief have been served on the United States by depositing same in a United States Post Office mail box with air-mail postage prepaid, addressed to the Solicitor General, Department of Justice, Washington, D. C. 20530, all in accordance with Rule 33 of the Supreme Court.

New Orleans, Louisiana, March [illegible], 1971.